U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 13Sep2001

Case No.: **2000-INA-00057**
CO No.: **P1996-HI–09049922/ML**

In the Matter of:

Footlex, Inc.
Employer,

on behalf of:

Noboru Kubota
Alien.

Appearance: Gerhard Frohlich/Xiaobin Ben Tao
for Employer and Alien

Certifying Officer: Rebecca Marsh Day
San Francisco, California

Before: Vittone, Burke, and Chapman
Administrative Law Judges

LINDA CHAPMAN
Administrative Law Judge

Decision and Order Affirming Denial of Certification

This case arose from an application for labor certification on behalf of Alien Noboru Kubota ("Alien") filed by Footlex, Inc. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer and the Alien requested

review pursuant to 20 C.F.R. § 656.26.

Statement of the Case

On April 14, 1995, the Employer Footlex, Inc., filed an Application for Alien Employment Certification, seeking to fill the position of "General Manager." The duties for this position were described as:

> Plans and prepares work schedules and assigns employees to specific duties. Formulates pricing policies on merchandise according to requirements for profitability of store operations. Coordinates sales promotion activities and prepares, with employee help, merchandise displays and advertising copy. Supervises employees engaged in sales work, in the taking of inventories, in the reconciling of cash with sales receipts and in the keeping of operating records. Selects merchandise from Japan to be ordered for retail in Hawaii. Answers customers' complaints and inquiries. Interviews, hires, trains and supervises employees. Reviews monthly profit and loss reports, prepared by an accountant, and reports them and discusses them with the owners in Japan. Teaches employees how to repair the massage machines sold by the Employer and supervises necessary repairs made by the employees. Makes semi-annual trips to Japan to research new merchandise. Lectures at seminars on the principles of reflexology and massage machines.

Two years of experience in the position were required. Also, the position required that the employee be "able to read, write and speak Japanese with a high degree of proficiency." The employee had to have a basic knowledge of reflexology and the health benefits of massage machines and needed to be able to determine the cause of and repair problems with massage machines. The Employer also required that the employee have knowledge of the customs requirements associated with importing health products (AF 201). The position was advertised as "Manager, Retail Store." (AF 218). One candidate interviewed for the job, but was not hired because of "his lack of product knowledge and experience regarding the Employer's principal products and Mr. Asada's indication that he is not interested in the position, realizing his lack of knowledge and experience regarding the Employer's products" (AF 208).

On December 9, 1998, the Certifying Officer, Rebecca Marsh Day (CO), issued a Notice of Findings (NOF) in which she advised the Employer of her intent to deny its application. As grounds for this denial, the CO noted that the position was not clearly open to U.S. workers (20 C.F.R. § 656.20(c)(8)), because the Alien, as the general manager, had "a considerable degree of control over the operations of the company" and because the Alien had in the past been in business with the Employer as Suntomi Corporation. The Employer was asked to provide documentation regarding the Alien's ownership interest in the firm, articles of incorporation for the firm, a statement describing the scope of the Alien's hiring authority, an explanation telling how the person responsible for hiring for the current position is free from the Alien's control, and evidence that the position was clearly open to U.S. workers. The CO also noted that the current application did not support a finding that the Employer

met the definition of "Employer" found at 20 C.F.R. 656.3, based on the Employer's admission that it was a small company and the U.S. applicant's belief that the Employer was a concession rather than a retail establishment. The CO indicated that there were questions as to whether the Employer (1) had a current job opening, (2) was operating an ongoing business, and/or (3) could provide full-time, permanent employment. The CO requested that the Employer submit documentation that it was capable of providing "permanent, full-time employment to a U.S. worker and the terms and conditions stated on the ETA750A." This information was to include copies of the Employer's business license and state and federal tax returns. Finally, the CO noted that the Japanese language requirement violated 20 C.F.R. § 656.21(b)(2)(i)(c). She noted that general manager positions do not normally require foreign language abilities, and that the justification for this requirement (that the company was a subsidiary of a Japanese company) supported her contention that the Employer could not provide full-time, permanent employment for a U.S. worker. She required that the Employer either delete the foreign language requirement and retest the labor market (which would have resulted in a remand to the Job Service), or justify the foreign language requirement's business necessity by showing that the language requirement bears a "reasonable relationship to the occupation in the context of the Employer's business" and that the foreign language ability is "essential to perform, in a reasonable manner, the job duties" (AF 196-199).

On January 20, 1999, the CO received the Employer's rebuttal information, which included a six page letter and approximately 179 pages of documentation. The Employer stated that it was a Hawaii corporation owned completely by a Japanese citizen and resident and that it operated three retail stores in Hawaii, where it sold massage equipment and other health products manufactured in Japan.

The Employer disagreed with the CO's contention that the position was not clearly open to U.S. workers. The Employer asserted that the Alien's control over the operation of the company was limited to that of any general manager, and that the Alien was at one time the secretary and later director of Suntomi (now Footlex), but that he never had an ownership interest in it. All of the shares of Footlex, Inc. were assigned to Nobuko Uonashi in 1991. Articles of Incorporation of Suntomi Corporation from October 13, 1989, show that the Alien was not a corporate officer or board member; and Articles of Correction of Suntomi Corporation from November 22, 1989, show that the Alien was named as Secretary and Director, but that he does not own any shares in the corporation. The Resolution which changed Employer's name to Footlex, Inc., continues to show the Alien as the Secretary. As general manager, the Alien makes all personnel decisions for those people he supervises, but the personnel decisions regarding the general manager are made by Ms. Uonashi, who owns the corporation. The Employer further stated that "[t]he alien can influence the decision only by the quality of his services." The Employer also referenced its recruitment efforts, which included newspaper listings, postings at its office, and listing of the job in the Employment Services system, as well as interviewing a candidate for the position. The Employer disputed the CO's finding that it was really a concession for another company, noting that it had maintained three outlets for 10 years.

The Employer also disagreed with the CO's conclusion that the foreign language requirement was restrictive. While acknowledging that general manager positions do not generally require an applicant to have foreign language skills, the Employer submitted that Japanese skills were a business necessity, because of the relationship between the Employer and Seiko Shoji (another company having the same owner as the Employer), and because "the language bears a reasonable relationship to the occupation in the context of our business and is essential to perform the job duties." The Employer noted that its owner speaks no English, that all correspondence with her must be in Japanese, and that the Employer rents space in a Japanese department store that sells Japanese merchandise and has a Japanese restaurant, grocery store, and other Japanese retailers. The Employer estimated that 10-20 percent of its customers speak little or no English, and that 50 percent of its tourist customers speak little or no English and expect to communicate with them in Japanese. The company advertises in Japanese language publications. The products sold by the Employer are manufactured by Japanese companies and have instruction manuals printed in Japanese. Thus, the general manager must be able to read the directions and translate them for other employees and customers. Repair and parts manuals for the massage machines are also printed in Japanese; promotional materials for the Employer's products are written in Japanese. The Employer finally noted that the general manager must be proficient in Japanese in order to order merchandise, prepare monthly reports, repair and supervise the repair of machines, and make buying trips to Japan (AF 12-17).

The following documentation was included with the letter of rebuttal.

(1) A February 2, 1991 assignment of shares to Nobuko Uonashi (AF 18).
(2) Articles of Incorporation dated October 13, 1989 incorporating Suntomi Corporation as a Hawaii corporation (AF 19-30).
(3) A correction to the Suntomi Corporation Articles of Incorporation dated November 22, 1989, naming the Alien Secretary of the corporation and a Director (AF 31-33).
(4) An action taken by written consent changing the name of the corporation to Footlex, Inc., dated July 20, 1990, indicating that the Alien had been elected Secretary (AF 34-35).
(5) A General Excise Tax License issued by the State of Hawaii to Footlex Inc. d/b/a Footlex Inc., dated November 17, 1994 (AF 36), as well as State of Hawaii Excise/Use Tax Returns for the fiscal years ending September 30, 1996, 1997, and 1998 (AF 37-40).
(6) Quarterly federal income tax returns for the quarters ending January 4, 1999, October 6, 1998, July 10, 1998, and April 7, 1998 (AF 42-45).
(7) Unemployment tax returns for 1994-1997 (AF 46-49).
(8) Unsigned corporate income tax returns and attachments for the fiscal years ending September 30, 1995, 1996, and 1997 (AF 50-88).
(9) Accounting statements with balance sheets from Gilford Sata & Associates, CPAS, Inc., reflecting balances as of September 30, 1995, 1996, 1997, and 1998 (AF 89-100).

(10) Documents and correspondence written in Japanese; credit card statements reflecting the Alien's expenditures made in Japan, Taiwan and Hong Kong; telephone records showing phone calls made to Japan; diagrams labeled in Japanese; Japanese language or Japanese-related publications and articles; and other instructions drafted in Japanese (AF 101-195).

On June 17, 1999, the CO issued a Final Determination (FD) denying certification, based on the Employer's failure to rebut the findings in the December 9 NOF. The CO reviewed the information and documentation submitted on rebuttal. She noted that the Employer did not contest the fact that the Alien worked for the parent company of the Employer in Japan or that the Alien was the Secretary of the corporation, though not a shareholder. She further noted that the Employer's owner had "no permanent right to reside in the U.S." Also, the tax returns showed that in the years 1994 and 1996, the Employer showed a constant gross of approximately $400,000.00 and a constant loss of approximately $18,000.00 across the three stores. She stated that this information further supported the contention that the business was a small one and was a "concession, rather than a full-fledged retail outlet." She concluded that the Employer was a "small company dependent on infusions of capital from Japan to cover [its] yearly losses" and that as the gross had not grown in the previous three years, she did not believe that the Employer truly had a "permanent, full-time job opportunity *clearly* open to any qualified U.S. workers" (AF 10-11).

On July 15, 1999, the Employer filed a request for reconsideration or, in the alternative request for administrative review. Included with the request for review were the Alien's W-2 forms for the years 1994 to 1998, as well as a letter from the owner of the Employer (AF 4-8). Evidence first submitted with the request for review and not in the record upon which the denial was based will not be considered by the Board. *See University of Texas at San Antonio*, 1988-INA-71 (May. 9, 1988). As the CO never ruled on the motion for reconsideration, it is apparent that she did not review this new evidence. Thus, the Board will not consider it.[1]

On November 16, 1999, the CO forwarded this case for administrative review without ruling on the Motion for Reconsideration. On November 2, 2000, this office issued an Order directing the Employer to state whether it wished the case to be remanded to the CO for a ruling on the Motion for Reconsideration. By letter of November 9, 2000, the Employer waived its right to a remand.

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[1] Indeed, this information does not help the Employer. Among other things, the owner of the company states that the President wants to retire, and they need the Alien to work for them permanently; that the Alien is the only one who can continue the business, and that without him, the company would be forced to close. These representations establish beyond a shadow of a doubt that the general manager position was created for the Alien, and that there was never any intention of hiring anyone else.

Discussion

In this case, in discussing her conclusion that there was no clear opening for U.S. workers, the CO referred to the Employer's submission of articles of incorporation and tax returns; the Alien's status as a corporate officer; and the fact that the owner of the Employer resides in Japan; and determined that, since the Employer was a small company dependent on infusions of capital from Japan to cover yearly losses, and that the Employer's gross had not grown in three years, there was not a permanent, full-time job opportunity clearly open to any qualified U.S. workers.

With respect to the CO's conclusion that there was no permanent, full time position, in *TLC Residential Home Care*, 1999-INA-0139 (Sept.14, 1999), the Board found that the "Employer failed to demonstrate that it has sufficient funds to pay the Alien's wages and therefore, failed to carry its burden of proving that the offered job is permanent and full-time." While the Board would not allow the introduction of the Employer's relevant facility licenses on appeal, it concluded that even if the Employer had been a legal business at the time of the application for labor certification, the Employer's tax records revealed that it had inadequate income to pay the salary as advertised. *Id*.

In the FD the CO discussed the Employer's tax returns for 1994 and 1996, noting that they showed a constant loss of $18,000. In fact, three tax returns were submitted, for fiscal years ending in 1995, 1996, and 1997.[2] In each of these three fiscal years, the Employer showed negative taxable income, which averaged across the three years was approximately $20,000.00. The tax returns for 1995 and 1997 reflect that the Alien was paid $51,540.00 and $51,918.00, respectively, as compensation for an officer, not as a salaried employee. The return for 1996 reflects a payment of $53,540.00 to an officer, but no officer is identified on the Schedule E. The reasonable assumption is that this amount was paid to the Alien. Accounting records reflect that the Employer paid for expenses such as advertising, salaries, lease improvements, and insurance. This company has been incorporated since 1989. Whether the Employer is a concession or a retail outlet is irrelevant. Though the Employer shows a paper loss, it is clear that the Employer, a duly enacted Hawaii corporation[3], has the funds to pay for the position, and indeed, was already paying a roughly equivalent amount to the Alien, albeit in the form of officer compensation, at the time of the application. Thus, to the extent that the CO determined that there was not a permanent, full-time opportunity, her decision is overruled.

However, the CO also determined that the position was not clearly open to qualified U.S.

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[2] Apparently the CO relied on the preprinted date on the tax forms, rather than the information entered on the forms showing the tax year being reported.

[3]The CO also noted that the Employer's owner did not have the right to permanently reside in the United States. This fact is irrelevant, as the owner of the Hawaii corporation is not seeking alien labor certification for herself.

workers. The Board has previously held that 20 C.F.R. 656.20(c)(8) requires that an Employer have a "bona fide job opportunity." *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (en banc). The need to question the existence of a bona fide job opportunity arises when "the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring Employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant." *Id.* In this case, although the NOF clearly raised this issue, the reasoning of the CO in her FD, finding that there was no clear opening for U.S. workers, is light on supporting reasoning. However, it is clear, based upon the voluminous supporting documentation submitted in rebuttal, that Employer had adequate notice of what would be required as corrective action to demonstrate a bona fide full-time position.[4] Evidence that Employer had adequate notice may excuse less than fully explained reasoning in an FD. *Uy, Kennedy, supra*. Upon consideration of Employer's documentation in light of the "totality of circumstances" test, I find that the Employer has failed to establish a bona fide full-time position exists.

When an Employer seeks certification for an alien who is in a position to control hiring decisions or plays such a dominant role in the business that the Employer would be unlikely to replace the alien with a qualified U.S. applicant, the Certifying Officer may carefully examine whether the Employer has complied with the regulations. Section 656.20(c)(8) requires that an Employer show that the job opportunity has been, and is, clearly open to qualified U.S. applicants. The Employer has the burden of proving by clear evidence that a valid employment relationship exists, that a bona fide job opportunity is available to U.S. workers, and that the Employer has sought, in good faith, to fill the position with a U.S. worker. *Amger Corp*., 87-INA-545 (Oct. 15, 1987) (en banc).

The test for whether there is a bona fide job opportunity for a qualified U.S. applicant is an examination of such factors as whether the alien is in a position to control or influence the hiring process; is related to corporate officers and/or directors; was an incorporator or founder of the company; has an ownership interest in the company; is involved in the management of the company; is one of a small number of employees; or has qualifications identical to specialized job duties stated in the application. *Modular Container Systems, Inc.*, 89-INA-228 (July 16, 1991) (en banc). Applying the factors cited by *Modular Container*, the evidence establishes that there is no bona fide job opportunity for a qualified U.S. applicant.

I find that, considering the totality of the circumstances, there was no job opportunity clearly

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[4] In her FD, the CO observed that the Alien had previously been employed by the Employer's parent company in Japan and that he served as secretary of the corporation and a director. The only other evidence discussed by the CO was related to the financial viability of the business. Nevertheless, in the NOF, the CO put the Employer on notice that it should demonstrate that the position was clearly open to qualified U.S. workers. The factors enumerated in *Modular* were clearly contemplated by the CO, as demonstrated by the documentation she requested in the NOF.

open to U.S. workers, and that it is unlikely that the Employer would remove the alien in favor of a U.S. worker. The evidence submitted by the Employer shows that the alien has been an officer and director of the Employer virtually since its inception as Suntomi Corporation in 1989, and in fact, is paid for his services as an officer, not as an employee of the Employer.[5] The Employer's tax records reflect that there were at various times either four or six "employees" for the three stores that are part of the Employer's business, whose combined wages totaled less than $50,000. The evidence submitted by the Employer also reflects that the Alien speaks Japanese, corresponds in Japanese, and travels to Japan on behalf of the Employer. To the extent that tax forms and other financial reports submitted by the Employer were signed, they were signed by the Alien.

In its rebuttal, the Employer indicated that the Alien's control over the operations of the company "doesn't exceed that of any general manager." This, of course, begs the question as to what degree of control and authority a general manager has. In discussing the need for a general manager to speak Japanese, for example, the Employer states that the job duties of the Alien include ordering merchandise from Japan, preparing monthly reports for the owner, repairing and supervising repair of the massage machines, making semi-annual buying trips to Japan, and lecturing in Japan on the principles of reflexology and massage machines. In this instance, given the Alien's status as director and officer, his compensation, which exceeds that of all of the employees combined, and his job duties as described by the Employer, the inescapable conclusion is that the Alien plays such a dominant role in the business that the Employer would be unlikely to replace the Alien with a qualified U.S. applicant.

The CO also required that the Employer explain how the person responsible for hiring for the position was free from the Alien's control. In response, the Employer asserted that

> The Japanese owner of our company makes the hiring decisions for all managerial and executive positions, including the position in question, in consultation with me. Her interest is to have only qualified managerial and executive employees. The Alien can influence the decision only by the quality of his services.

Given the amount of wages paid to the "employees" in 1994, 1995, and 1996, in contrast to the compensation paid to the Alien, it appears that there is only <u>one</u> managerial or executive position in the company, that held by the Alien who, according to the tax returns, is not an "employee," but is acting in his capacity as an officer/director of the company. There is no evidence that the Japanese owner of the company has <u>ever</u> made a hiring decision, managerial, executive, or otherwise, with

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[5] Thus, the Employer's tax returns for 1995 and 1997 reflect that the alien was paid $51,540.00 and $51,918.00, respectively, as compensation for his services as an officer of the Employer. The return for 1996 indicates that $53,540.00 was paid in compensation to officer(s), but the Schedule E does not indicate the identity of the officer(s). It is reasonable to assume that that person is the alien.

respect to the Employer. In fact, she resides in Japan, and speaks no English. Clearly, if she were to make the hiring decision for the position in question, she would need to rely on someone with knowledge of the day to day operations of the business to advise her in the selection of a general manager. According to the Employer, that person will be the president, who will have the crucial input on this issue. But there is no evidence that he has any knowledge of the business operations, or what will influence his determination on this question; there is no explanation of how the president is free from the Alien's control in this regard. Moreover, the Employer's response suggests that if the owner is happy with the job the Alien has been doing thus far, she will not replace him with a "general manager."

The evidence leads to the inescapable conclusion that the Alien is the sole person responsible for running the operations of the company, and indeed, that without his services the company could not survive. Equally important, he has qualifications for the job identical to the specialized or unusual job duties and requirements stated in the application.[6] It would be difficult to imagine how the job could have been tailored to more specifically meet the Alien's qualifications. Here, there was no job open to U.S. workers; the only worker the Employer ever intended to consider for the position was the Alien. Although the Employer has gone through the motions of the labor certification process, it is clear that the Employer is not interested in hiring anyone but the Alien.

Considering the totality of the circumstances, including the Alien's status as a corporate officer, his dominant role in the running of the Employer's business, the failure of the Employer to demonstrate that the Alien does not have the ability to control or influence hiring decisions for the particular job, the number of employees of the company, and his virtually identical qualifications for the specialized job duties, I find that the Employer would not likely continue to run the business without the Alien. Thus, the Employer has not shown that this position is clearly open to U.S. workers. The CO's denial of labor certification was, therefore, proper. As labor certification has been denied, the issue of the existence of a business necessity for fluency in the Japanese language need not be addressed

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A
LINDA S. CHAPMAN

[6] Indeed, in describing the Alien's job duties, the Employer repeats almost word for word the duties described in the Application.

Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.